No. 97-2000

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

Supreme Court, U.S.
FILED
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AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,
v.
DOROTHY SCOTT SULLIVAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE PENNSYLVANIA TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE WORKPLACE INJURY LITIGATION GROUP, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE [1]

The Association of Trial Lawyers of America ["ATLA"] is a voluntary, national bar association. Most of its 50,000+ members represent injured plaintiffs, including

[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than Amicus Curiae made a monetary contribution to the preparation or submission of this brief. Written blanket consensus to the filing of this and other amici briefs in this proceeding have been filed with the Clerk.

those who have suffered their injuries as a result of their employment.

The Workplace Injury Litigation Group, Inc. ["WILG"], an independent offshoot of the ATLA, is likewise a nationwide association of attorneys. Its members practice almost exclusively in the field of workers' compensation on behalf of injured employees.

The Pennsylvania Trial Lawyers Association (PATLA), is a non-profit professional organization with approximately 4,000 attorney members. While there are no restrictions on membership, the majority of the Association's attorneys are actively involved in civil litigation among which cases include workers compensation litigation. One of the principal functions of the Association is the advancement of the law through Amicus Curiae and education programs. In this respect, the Association has an abiding interest in the development of case law under the Pennsylvania Workers' Compensation Act. The Association has for at least 15 years supported extensive seminar programs regarding the Pennsylvania Workers' Compensation Act.

The Amici believe that the Court of Appeals for the Third Circuit was correct in its interpretation of this case as it defines both "state action" and "due process" in its application to the factual context. Rather than cover the arguments ably addressed by the Respondents, Sullivan et al., Amici hope to set forth the basis for the unique statutory framework of workers' compensation benefits in Pennsylvania. Amici seek to dispel the argument that entitlement to medical benefits and the resulting access to uninterrupted medical care simply involves private insurance contract disputes over benefits which Petitioner insurer's allege are not subject to constitutional limitation by the due process clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

INTRODUCTION

On July 2, 1993, the Pennsylvania Legislature enacted Act 44 of 1993 which primary features included a number of statutory provisions designed to cut medical costs in the workers compensation system. 77 P.S. § 1 et seq. and § 531 (1993) (Historical and Statutory Notes). These procedures were varied, but the most significant provided that medical fees shall be capped at 113% of the Medicare reimbursement applicable in Pennsylvania under the Medicare program for comparable services. 77 P.S. § 531(3)(i) (1993). Major costs savings were realized by limiting reimbursement for prescriptions and pharmaceutical services to 110% of the average wholesale price of the product. 77 P.S. § 531(3)(vi) (1993). Coordinated care organizations were authorized. 77 P.S. § 29, § 531(4), § 531.1 (1993). Captive treatment periods that required employees to treat with the company doctor were expanded from 14 days to 30 days from the date of the first visit.[2] 77 P.S. § 531(1)(i) (1993). Health care provider self-referrals and cross-referrals were prohibited. 77 P.S. § 531(3)(iii) (1993). One of the cost containment aspects of the Act 44 amendments of 1993 involved the creation of a utilization review procedure which is the subject of the Petitioner insurers' appeal from the Third Circuit Court of Appeals decision below. 77 P.S. § 29, § 531(5) and (6)(i) (1993).

The 1993 amendments excluded compensation for injuries sustained while an employee was driving an em-

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[2] In Act 57 of 1996, the captive treatment period was extended to 90 days, 77 P.S. § 531(1)(i) (1996). In Act 57 of 1996, the Pennsylvania legislature substantially expanded cost cutting for wage loss isssues in the Pennsylvania Worker's Compensation system, providing tremendous long term savings for insurance companies and SWIF. See Historical and Statutory Notes, 77 P.S. § 1 *et seq.* and 77 P.S. §§ 511.2, 512, 531, 582 (1996). In 1995, the Pennsylvania legislature rewrote 77 P. § 512, which significantly limited the compensability of hearing loss for Pennsylvania workers.

ployers motor vehicle but was not otherwise in the course of employment at the time of injury (77 P.S. § 481); granted insurers subrogation in auto accident cases by repealing 75 Pa. C.S.A. § 1720, entitled *Subrogation*, and § 1722; *Schroeder v. Schroeder*, 453 Pa. Super. 59, 682 A.2d 1305 (1996); suspended compensation for incarcerated claimants, (77 P.S. § 511 (1993); reenacted at 77 P.S. § 511.1)); limited compensation for professional athletes, (77 P.S. § 565); excluded compensation for intentionally self-inflicted injury, injury caused by violation of the law, or use of illegal drugs (77 P.S. § 431), and/or intoxication if the employer establishes "but for causation". (77 P.S. § 431.)

The Third Circuit concluded that the utilization review provision contained in Act 44. 77 P.S. § 531(5) and (6) were unconstitutional. These provisions added a utilization review procedure which allow insurers and self-insurers to suspend payment of medical benefits of thousands of workers without *any* notice and without *any* predeprivation opportunity to be heard while the review is pending. *Sullivan v. Barnett*, 139 F.3d 158 (3rd Cir. 1988), cert. granted,

SUMMARY OF THE ARGUMENT

Pennsylvania has enacted a public benefit system through the Pennsylvania Workers' Compensation Act designed to provide the exclusive remedy for injured workers seeking compensation and medical benefits from employers and their insurers for all work place injuries. Amici submit that the decision of the Third Circuit Court of Appeals was correct in holding that constitutional limitations apply to the actions: (1) of the Commonwealth of Pennsylvania in enacting the cost containment provisions of Act 44 of 1993, and (2) to parties implementing these, including insurers and employers, in suspending medical benefits, by invoking the utilization review process contained in Act 44 because they are state actions in this context.

The Third Circuit Court of Appeals decision correctly concluded that the actions of SWIF, private insurers and self-insureds of suspending payment for medical care after initiating utilization review with the approval of the Pennsylvania Department of Labor and Industry, is an unconstitutional violation of procedural due process protected by the Fourteenth Amendment because the supersedeas provision of 77 P.S. § 531(5) and (6) do not afford disabled employees *any* notice or an opportunity to be heard before their benefits are suspended.

Further, Amici respectively suggest that the remedy suggested by the Third Circuit, which has since been instituted by the Pennsylvania Department of Labor and Industry since the decision below was announced, is a minimal and reasonable requirement for ensuring procedural due process of law to disabled Pennsylvania workers seeking medical care for concededly work related injuries. The Third Court stated that a disabled worker must be given:

> "(1) timely and reasonable notice of imminent suspension of the medical benefits and treatment before the suspension takes effect; (2) a description of the reasons why utilization review has been invoked; (3) an opportunity and time to submit a personal statement in writing regarding the employees view of the reasonableness and/or necessity of the disputed medical treatments; and (4) a description of the procedures under which the employee can appeal an adverse determination."

139 F.3d at 178.

These minimal burdens placed on employers and insurers invoking utilization review in the Pennsylvania Workers' Compensation system will reduce the significant risk of erroneously terminating or suspending an employee's medical benefits and access to medical care when and as needed, a property right recognized under Pennsylvania law. *Sullivan v. Barnett*, 139 F.3d at 176, 178. Affording Pennsylvania's disabled workers with procedural

due process in the utilization review process has since been instituted in Pennsylvania with little difficulty or expense or adverse effect on insurers. The decision of the Third Circuit below leaves undisturbed significant constitutional means of promoting the state's interest of controlling health care costs for treatment of work related injuries, including establishing medical fee caps of 113% of Medicare reimbursement for medical services, and reimbursement for prescription drugs and pharmaceutical services at 110% of the average wholesale price of the product, among others.

ARGUMENT

In The Context Of The Public Benefit System Of The Workers Compensation System In Pennsylvania, The Petitioner Insurers' Suspension Of Payment For Medical Care, In Accordance With The Act 44 Of 1993 Amendments To The Pennsylvania Workers' Compensation Act, Which Did Not Afford Disabled Workers *Any* Predeprivation Notice Or Opportunity To Respond Before Suspension Takes Place, Constitutes State Action And Violates Procedural Due Process Of Law Guaranteed By The Fourteenth Amendment.

In 1915, the Pennsylvania legislature amended the Pennsylvania Constitution Article III, § 18 to allow the government to implement a comprehensive workers compensation system, the Workers' Compensation Act of 1915. *DeJesus v. Liberty Mutual Insurance Co.*, 439 Pa. 180, 268 A.2d 925, 926 (1970). The language chosen in the enactment of Article III, Section 18 was to ensure "an employee's need to be compensated for his or her work related injuries." *Grosser v. L.E. Smith Glass Co.*, 95 Pa. Cmwlth. 450, 505 A.2d 1093 (1986) (en banc). The Pennsylvania Supreme Court has stated that proceedings in workmen's compensation cases "are essentially of a judicial character." *See Shortz v. Farrell*, 327 Pa. 81, 193 A. 20, 22 (1937).

Administering this "obligation imposed by statute on employers", (*Hankee v. Wilkes-Barre Scranton International Airport*, 532 Pa. 494, 616 A.2d 614, 619 (1992)), is "purely" an exercise of the "police power" of the Commonwealth regulating the employer-employee relationship. (*Bible v. Com. Dept. of Labor and Industry*, 548 Pa. 247, 696 A.2d 1149, 1153 (1993)). In order to provide for this system of public benefits by which all employees become entitled as an incident of employment in Pennsylvania, "it was necessary to amend the Constitution of the Commonwealth to give the authority to enact it. *See* Pa. Const. Art. III, Sec. 18., *Hankee*, 616 A.2d at 617 n.6. [I]n determining the nature of the benefits it cannot be ignored that the employer is obligated to provide the compensation without regard to the obtaining of insurance . . ." *Hankee, supra*, 616 A.2d at 617.

"Compensation" under the Pennsylvania Workers' Compensation Act includes "payment for reasonable surgical and medical expenses . . . . *as and when needed* . . ." 77 P.S. § 531(1) (1978). See, *Reilly v. W.C.A.B. (General Elec. Co.)*, 98 Pa. Cmwlth. 488, 512 A.2d 749 (1986), app. den. 514 Pa. 651, 524 A.2d 496, app. rem. 136 Pa. Cmwlth. 543, 584 A.2d 364 (1991) (medical expenses constitute compensation). The amendments to 77 P.S. § 531(1) contained in Act 44 of 1993 continue to express a legislative intent to provide reasonable and necessary medical treatment for injured workers in Pennsylvania as and when needed:

> "The employer shall provide payment in accordance with this section for reasonable surgical and medical services . . . *as and when needed*."

Id.

Like the state's obligations to inmates in *West v. Atkins*, 487 U.S. 42 (1988), the Commonwealth of Pennsylvania has an obligation under the Pennsylvania Workers' Compensation Act to ensure adequate access to medical care for workers whose rights have been restricted by the Act's exclusive remedy provision. 77 P.S. 481. Shifting this obligation to the charity of the health care

industry is *not* adequate nor proper.[3] In the proposed rulemaking published by the Department of Labor and Industry (34 Pa. Code Chs. 121 and 127, published Pennsylvania Bulletin, Vol. 24, No. 30, July 23, 1994), the Commonwealth of Pennsylvania reaffirmed this duty wherein it stated that "these proposed regulations ensure that individuals with work related injuries and illnesses continue to have adequate access to quality medical care in this Commonwealth." *Id.*

It is well settled in Pennsylvania that medical benefits are payable "as and when" needed by the provisions of the Act regardless of whether the claimant is working, is receiving, or has received wage loss disability benefits. *Deremer v. W.C.A.B. (R.S. Glass, Inc.)*, 61 Pa. Cmwlth. 415, 433 A.2d 926 (1981). The choice of the statutory words "as and when needed" clearly were chosen to ensure uninterrupted continuity of care. Pennsylvania does not require that medical treatment restore earning power. Treatment for the alleviation of pain is a sufficient basis to establish reasonableness and necessity of medical care. In 1972 and 1978, the Pennsylvania legislature amended the Act to make clear that the reasonable and necessary medical treatment is compensable, whether or not, restoration of earning power occurs. The Act does not, as the Amici Curiae American Insurance Association, et al. claim, "limit treatment in accordance with a return-to-work objective." (Amici AIA et al., p.6). Allowing an injured worker's written statement explaining the efficacy of treatment in alleviating an individuals pain or modifying the severity of a workers symptoms to be submitted to the

[3] The American Medical Association Code of Medical Ethics does not regulate hospitals, drug stores, chiropractors, osteopaths, medical equipment suppliers or numerous other health care providers. Further, American Medical Association ethical guidelines do not provide a legally enforceable right or cause of action to patients. Likewise, Pennsylvania Medical Practice Act of 1985, P.L. 457, December 20, 1985 does not provide any private remedy to aggrieved patients. 63 P.S. § 422.1 et seq.

URO prior to deprivation is minimal due process required under the circumstances. *Sullivan v. Barnett*, 139 F.3d at 177 (3rd Cir. 1998) ("The personal written submissions of such disabled workers is critical to assessing the relative benefits that a particular treatment or practice might have.")

To make this point absolutely clear, in 1978 the Pennsylvania legislature amended Section 306(4) of the Act, 77 P.S. § 531(d) to state in pertinent part: "The provisions of this section shall apply in injuries whether or not loss of earning power occurs." Act of July 1, 1978 P.L. 692, No. 119 § 1, 77 P.S. § 531. *Deremer v. W.C.A.B.*, 61 Pa Cmwlth. 415, 433 A.2d 926 (1981). Accord *Tobias v. W.C.A.B. (Nature's Way)*, 141 Pa. Cmwlth. 438, 595 A.2d 781, 785 (1991) app. den., 529 Pa. 628, 600 A.2d 543 (1991) (expenses for both husband and wife related to artificial insemination when necessitated by sexual dysfunction caused by work-related spinal cord injury, are compensable under the Act.).

The 1993 amendments to 77 P.S. § 531 retained this language that "[t]he provisions of this section shall apply to injuries whether or not loss of earning power occurs." 77 P.S. § 531(1)(ii) (1993). The right to timely reimbursement for reasonable and necessary work-related medical care provides a disabled worker with a legitimate claim of entitlement which constitutes constitutional property. *See* e.g. *Board of Regents v. Roth*, 408 U.S 564, 577 (1972); *Baksalary v. Smith*, 579 F. Supp. 218 (1984) app. den. 469 U.S. 1146 (1985), aff'd 772 F.2d 893 (3d Cir. 1985) (Finding a person that already receives workers compensation benefits has a property interest in the continued receipt of such benefits.) In the decision below, the Third Circuit recognized that the "employees' interest is in the uninterrupted payment of their medical benefits pending the final administrative decision on their cases." *Id.* 139 F.3d at 774. Unsurprisingly, the Third Circuit below reasoned that injured workers have an interest in the relief that medical treatment provides:

"The remedies that the Act provides to an employee whose medical benefits are unjustly terminated provide merely superficial redress as they focus upon a monetary interest as distinct from a medical interest in one's well-being. Further, as medical benefits are typically terminated upon invocation of utilization review, the employee does not receive any medical treatment pending review and thus there may be no medical costs to reimburse upon a determination that the medical treatments were, in fact, reasonable and necessary. Once the supersedeas is invoked, it can take several months before the URO reaches its decision and—before the reconsideration process was rescinded—even longer if reconsideration review was requested. Although a monetary award may compensate an individual for financial losses, a monetary award cannot be deemed an adequate, effective, or appropriate substitute for relieving an employee's disability or pain. Nor can it be a substitute for necessary medical care. Hence, we are persuaded that the employees' private interest in receiving uninterrupted medical benefits is a weighty and significant factor in the pre-termination calculus."

139 F.3d at 175.

This is consistent with federal precedent establishing that timely medical attention is a basic necessity of life. *See e.g. Memorial Hospital v. Maricopa*, 415 U.S. 250, 259, 261 (1974).

As part of this system of public benefits, the legislature also established the State Workmen's Insurance Fund (S.W.I.F.) in 1915, recognizing the state's need to insure access to workers' compensation insurance for all Pennsylvania employers. SWIF was created for the purpose of insuring employers against liability under the Pennsylvania Workmen's Compensation Act. 77 P.S. § 221 (repealed 1996 and the subject matter subsequently modified

and re-enacted at 77 P.S. § 2621 et seq.)[4] *See also* 77 P.S. §§ 501, 701 (1978). All of SWIF's premiums are paid to the State Treasurer, who serves as custodian of the Fund. 77 P.S. §§ 223, 342 (1992).

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[4] The Pennsylvania legislature has in the past commingled SWIF and other state funds by using the SWIF surplus to help fund the general budget in 1988 and 1989. *See e.g.* Act No. 1988-56A, October 14, 1988, Appendix 1a. *Scranton Times*, February 10, 1988 "Reallocation Proposal Gets SWIF Board Nod." Appendix 9a. *Scanton Times*, March 10, 1988 "State Fund-Transfer Fund is Both Criticized and Praised"), Appendix 2a. On October 14, 1988, then Governor Casey signed Act 1988-56A which authorized the transfer of reserve funds of the State Workers Insurance Fund directly to the General Fund and the Treasury Department, thus demonstrating the symbiotic relationship inherent in the Pennsylvania Workers Compensation system. (*See* Act 1988-56A attached.)

The text of the Act 1988-56A provides:

Appropriating and transferring amounts from the State Workmen's Insurance Fund to the Treasury Department and the General Fund.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The following sums, or as much thereof as maybe necessary, are hereby appropriated from the State Workmen's Insurance Fund for the fiscal year beginning July 1, 1988:

(1) The sum of $25,000,000 is appropriated to the Treasury Department for transfer to the Sunny Day Fund.

(2) The sum of $25,000,000 is appropriated to the Treasury Department for transfer to the Tax Stabilization Reserve Fund.

Section 2: The sum of $60,000,000 is hereby transferred from the State Workmen's Insurance Fund to the General Fund.

Section 3: This act shall take effect immediately.

Approved—The 14th day of October A.D. 1988

ROBERT P. CASEY

In 1988, the General Assembly of the Commonwealth of Pennsylvania transferred in excess of $200 Million Dollars from the reserve of the State Workmens Insurance Fund to fund general obligations of the state. *See Scranton Times*, March 10, 1988 "State Fund—Transfer Fund is Both Criticized, Praised." (Appendix 2a).

SWIF is considered the insurer of last resort because it is required by law to write policies for employers that cannot obtain coverage on the open market. (Appendix 3a). Private insurance companies derive a direct benefit by the existence of SWIF. Indeed, the petitioners insurers have sought to raise issues on behalf of SWIF in this case because of the financial interdependence of SWIF and private insurers in the integrated Pennsylvania Workers' Compensation system. (See Petitioners Brief pg. 30, n.15). Private insurers such as Petitioners can avoid writing high risk employers because SWIF is available to provide state mandated workers compensation coverage, as insurer of last resort.

The Pennsylvania legislature has in the past commingled SWIF and other state funds. (*See* Footnote 4, e.g. Act 1988-56A. October 14, 1988, App. 1A, 2A, 9A). SWIF has been adjudicated to be a state actor whether insuring public or private employers. *Baksalary v. Smith*, 579 F. Supp. at 230. *See also Rumpf v. SWIF*, 964 F. Supp. 180, 186 (E.D. Pa. 1997).

As partial justification for denying disabled workers predeprivation notice and opportunity to be heard under the circumstances of this case, the Respondent School District of Philadelphia and Petitioner insurers assert that in 1993 SWIF was on the verge of bankruptcy, and was actuarially unsound because of rising medical costs. (*See* Petitioner insurers School District Brief, pg. 3 and Petitioner Insurers Brief, pg. 1). These assertions are not actuarially substantiated by the parties herein. Further, neither party mentions in their briefs that in 1988 and 1989 the Pennsylvania legislative and executive branches raided the SWIF reserve fund of substantially more than $200 Million Dollars of subscriber premiums to pay general fund obligations. *See* e.g. Act 1988-56A, October 14, 1988, Appendix Exhibit 1A, *Scranton Times*, March 10, 1988 "State Fund-Transfer Fund is Both Criticized and Praised" *Scranton Times*, February 10, 1988, "Reallocation Plan Gets SWIF Board Nod". App. 9A.

Also, in 1992, prior to the enactment of the Act 44 of 1993, the Commonwealth was reported to have transferred well in excess of $17 million dollars from the SWIF surplus to purchase two failing southeastern Pennsylvania financial institutions, Tobias Knoblauch Private Bank of Reading and Marian Bank of Philadelphia. The Reading Eagle—April 18, 1993, App. 17a-18a. Apparently, less than half of the money was repaid without interest. After nearly failing, the formerly private Banks were re-opened in April, 1992, as Knoblauch State Bank and Marian State Bank. On April 20, 1992, it was reported that "The re-opened banks are owned by the State Workmen's Insurance Fund, which can provide capital to keep them in operation." App. Ex. 11A. *The Scranton Times*, Monday, April 20, 1992. *See also* App. Ex. 11A *The Reading Eagle, Dead Bank's Ghost Haunts Courts*, App. 12A; *The Reading Eagle*, April 18, 1993, *"Will Banks Success or Succeed?" See Knoll et al. v. Butler, et al., — Pa. Cmwlth —*, 675 A.2d 1308, 1310 (1996), aff'd, 548 Pa. 12, 693 A.2d 198 (1997). On September 14, 1994 Marian State Bank merged into Knoblauch State Bank (KSB) leaving KSB the sole entity, wholly owned by the State Workmen's Insurance Board which administers S.W.I.F. *Knoll v. Butler*, supra 675 A.2d at 1310 n.4. On January 10, 1995, S.W.I.B. resolved to sell all shares of KSB to Royal Bank for $8,543,850. *Knoll v. Butler*, 675 A.2d at 1510.

Indeed, SWIF has acknowledged in an affidavit filed with the Federal District Court for the Eastern District of Pennsylvania that the Pennsylvania legislature has authorized the commingling of SWIF funds with other state funds. *Rumpf v. State Workmen's Insurance Fund*, 964 F. Supp. 180, 186 (E.D. Pa. 1997). Thus, the financial condition of SWIF and its causes are considerably more complex than acknowledged by the Petitioners insurers and Respondent Philadelphia School District.

The Pennsylvania Supreme Court has explained that worker's compensation benefits are statutory public benefits rather than insurance benefits:

> "The payments an injured employee receives are not themselves insurance benefits, they are an obligation imposed by statute on the employer. When an employer obtains insurance to secure the risk that it will make such payments, it guarantees a source of the payment of such benefits, but this does not change the nature of the payments due the employee."

Hankee v. Wilkes-Barre Scranton International Airport, supra, 616 A.2d at 619. The right to continued enjoyment of these public benefits are a property right. *Baksalary v. Smith*, supra.

Amendment to Section 355 of the Act in 1966, 77 P.S. § 501 inserted the second sentence which requires the insurer to assume the employer's liability, and entitled the insurer to all of the employer's immunities and protections. *See* 77 P.S. § 501 [Historical and Statutory Notes]; *Jadosh v. Goeringer*, 442 Pa. 451, 275 A.2d 58 (1973). This, however, does not change the statutory nature of the obligations of the employer. *See Hankee*, supra. In *Brown v. Travelers Insurance Company*, 434 Pa. 507, 514, 254 A.2d 27, 29 (1969), a case decided before the Act was amended to specifically so provide, the Pennsylvania Supreme Court held that an employer's insurance carrier is immune from the suit as is the employer, a holding the Court found necessary to avoid "a regrettable discrimination . . . between employers who are insured by the State Workers' Insurance Fund or are self-insuring employers and those who carry private insurance." *Id.* at 514, 254 A.2d at 29. *See also, Keller v. Old Lycoming Twp.*, 286 Pa. Super. 339, 428 A.2d 1358, 1364-1365 (1981) (Court noted incongruity of treating workers differently simply because of the status of the payor of their workers compensation insurance.)

The Commonwealth expressly assumes the obligation of the insurance companies, if and when, an insurer becomes insolvent. 77 P.S. §§ 1053, 1055. *Sullivan v. Barnett*, 739 F.3d 158, 169 (3d Cir. 1998).

Prior to Act 44 of 1993, only a "referee" or "workers compensation judge" was authorized to make a determination that medical treatment and expenses were unreasonable or unnecessary and/or suspend benefits. As a result of the exclusive nature of the remedy under the Act, an injured employee has no practical remedy whatsoever to obtain reimbursement for medical treatment for work-related injuries outside the Act. The suspension of medical benefits and the determination of the necessity of treatment of concededly work related injuries clearly "involves the performance of a traditional function of the government." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624, (1991).[5] *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1157 (3d Cir. 1995) reh. den. 116 S.Ct. 165. As previously stated, the Pennsylvania Supreme Court has stated that compensation cases "are essentially of a judicial character". *Shortz v. Farrell*, 327 Pa. at 87, 193 A. at 22.

Act 44 of 1993 now initially delegates the governmental function of suspending benefits and thereafter determining reasonableness and necessity of treatment for presumptively work related conditions to insurers and utilization review organizations. 77 P.S. § 531(6)(i) (1993). The challenged utilization review provisions, 77 P.S. § 531(5) and (6), fail to provide any predeprivation notice or opportunity to be heard before medical benefits are suspended, superseded, or tolled. *Sullivan v. Barnett*, 139 F.3d at 172-173.

In the context of the Pennsylvania statute, an employers' or insurers' suspension, with state approval, of a workers medical benefits and uninterrupted access to treatment without any pre-deprivation safeguards, clearly

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[5] Prior to *Edmonson v. Leesville Concrete Co.*, supra, it has been stated that in order to constitute state action under [the public function] doctrine, private conduct must not only comprise something the government traditionally does, but something *only* the government traditionally does. *See Mark v. Borough of Hatboro*, 51 F.3d at 1157.

involves acting under color of state law. This statute delegates to employers and insurers the power to suspend a vested state entitlement to reasonable and necessary medical treatment when needed. In so doing, Petitioner insurers act to promote the Commonwealth encouraged statutory policy of cost containment at the expense of the procedural due process rights of concededly disabled workers to reasonable and necessary medical benefits as and when needed. Both the Petitioners American Manufacturers Mutual et al. (*see* pages 2-3) and the Respondent School District of Philadelphia (*see* pages 1-4) admit, in their briefs that the Commonwealth of Pennsylvania profits by the actions of the employers and insurers invoking utilization review without providing predeprivation notice and opportunity to be heard. The state's fiscal interest in a discriminatory action is "relevant" to a finding of state action in the total context of the subject circumstances. *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Edmonson v. Leesgeld Concrete Co.,* supra. *See also Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478 (1988); *West v. Atkins,* supra. The interpretation of the *Burton* decision by the U.S. Supreme Court in *Rendall-Baker v. Kohn,* 457 U.S. 830, 843-844 (1982) is instructive and demonstrates that state action should be found in the context of this case. The majority in *Rendall-Baker* reasoned:

> "In *Burton,* the Court held that the refusal of a restaurant located in a public parking garage to serve black Americans constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. 365 U.S., at 723, 81 S. Ct. at 860. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the *State profited* from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions."

Rendall-Baker v. Kohn, 457 U.S. at 843-44 (discussing significance of *Burton*).

To justify the lack of predeprivation notice and opportunity to be heard, the insurers cite the need for cost containment in the state system. SWIF, and the Commonwealth of Pennsylvania, directly benefit by the constitutional deprivations resulting from the utilization review procedure. This clearly is a significant and "relevant" factor. In *Edmonson v. Leesville Concrete Co.,* 500 U.S. at 622, this Court weighed "relevant" factors in making the state action determination rather than establishing an unrealistic litmus test. 500 U.S. at 622. Leaving flexibility in this area is clearly appropriate. The framers of the Constitution could not forsee telecommunications or computers, yet the Constitution continues to have application in these fields.

The Third Circuit Court of Appeals, in the decision below, concluded that:

> "The benefits provided to employees under the Act are a constitutionally protected entitlement. None of the parties disputes this. The Commonwealth has created this entitlement, and the Commonwealth guarantees that this benefits will be paid to an injured employee."
>
> * * * *
>
> "Although the insurance companies are private entities, when they act under the construct of the Workers' Compensation system, they are providing public benefits which honor state entitlement. In effect they become an arm of the State, fulfilling the uniquely government obligation under an entirely state oriented, self contained public benef system. It is a system which the government alone administers" *Edmonson,* 500 U.S. at 622, 111 S. Ct. at 2083-84. Thus, we conclude the insurance companies are a partner or an arm of the State in implementing legislation that administers constitutionally protected entitlement which the Commonwealth has enacted as a matter of policy.

> The right to invoke the supersedeas, or to stop payments, is a power that traditionally was held in the hands of the State. When insurance companies invoke the supersedeas (i.e., suspension) of an employee's medical benefits, they compromise an employee's State-created entitlement. The insurers have no power to deprive or terminate such benefits without the permission and participation of the Commonwealth. More importantly, however, the Commonwealth is intimately involved in any decision by an insurer to terminate an employee's constitutionally protected benefits because an insurer cannot suspend medical payments without first obtaining authorization from the Bureau. However, this authorization may be characterized, any deprivation that occurs is predicated upon the State's involvement."

193 F.2d at 168.

The decision of the Third Circuit below is consistent with Pennsylvania case law. In *Keller v. Old Lycoming Township*, 286 Pa. Super. at 348 n.6, 428 A.2d at 1363 n.6 (1981), the Pennsylvania Superior Court analogized this public benefit as being equivalent to a "soldier's right to a pension." *Id.*

The purpose of the Pennsylvania Workmen's Compensation Act is to provide the sole and exclusive means of recovery for all injuries within its scope. *See Socha v. Metz*, 385 Pa. 632, 123 A.2d 837, 839 (1956); *Povser v. Newman & Co., Inc.*, 514 Pa. 32, 522 A.2d 548, 550-551 (1987). "[T]he injured employee has no other right of action. By virtue of the Compensation Act, an employee's common law right to damages for injuries suffered in the course of his employment as a result of his employer's negligence is completely surrendered in exchange for the exclusive statutory right of the employee to compensation for all injuries, regardless of negligence, and the employer's liability as a tortfeasor under the law of negligence of injuries to his employee is abrogated." *Socha v. Metz*, 123 A.2d at 839-840. "[W]hile this employer assumes liability without fault for a work-related injury, he is relieved of the possibility of a larger damage verdict in a common law action." *Kuney v. PMA Insurance Co.*, 525 Pa. 171, 578 A.2d 1285, 1286 (1990); *Keller v. Old Lycoming Twp.*, 286 Pa. Super. 339, 428 A.2d 1358, 1363 (1984); ("[T]he amount of recovery, however, is below that which [the injured worker] might expect if he could obtain an award of damages at common law.").

The system is mandatory. An employee cannot opt out of the Pennsylvania Workers' Compensation scheme in favor of their own privately obtained coverage. (See 77 Pa. Stat. Ann. § 461, Historical notes); *Baksalary v. Smith*, 579 F. Supp. 218, 231 n.19 (E.D. Pa. 1984), aff'd 772 F.2d 893 (3rd Cir. 1988), cert. denied 469 U.S. 1145 (1985). A worker cannot bargain away statutorily prescribed workers compensation coverage. Historically, neither the employee, employer or insurer could enter a contract permitting payments contrary to the Act or varying the amount to be paid, or the period during which compensation is payable as provided in the Act. Such illegal agreements are "wholly null and void." Section 407, 77 P.S. § 731 (1972); *Rollins Outdoor Advertising v. W.C.A.B., (Maas)*, 506 Pa. 592, 487 A.2d 794 (1985); *Reilly v. W.C.A.B. (General Electric Co.)*, 98 Pa. Cmwlth. 488, 512 A.2d 749 (1986) app. den. *Petition of General Electric Co.*, 514 Pa. 650, 524 A.2d 495, app. den. 514 Pa. 651, 524 A.2d 496, app. after rem. 136 Pa. Cmwlth. 543, 584 A.2d 304.

In *Hankee v. Wilkes-Barre, Scranton International Airport*, 532 Pa. 494, 616 A.2d 614 (1992), the Pennsylvania Supreme Court *adopted the argument of workers' compensation carriers*, Aetna and Liberty Mutual, and the party employers, in ruling that workers compensation benefits do not constitute "insurance policy benefits". The Pennsylvania Supreme Court concluded that local government political subdivisions and their carriers had a right to subrogation of tort recoveries against third party tortfeasors whose negligence caused the worker's injuries. Accord,

Winterberg v. Transp. Ins. Co., 72 F.3d 318, 325 n.4 (3rd. Cir. 1998) (A workman's compensation claim is not based on an insurance policy within the meaning of [42 Pa. C.S.A. § 8371]. The claim is statutory and has its genesis in the contract of hire between the employer and employee (*see* 77 Pa. C.S.A. § 431), not an insurance contract. The employer's obligation to pay for a compensable injury is not predicated on an insurance policy.")

In *Hankee*, supra, the Pennsylvania Supreme Court explained the nature of this statutory benefit system for workers in Pennsylvania:

> "As the appellees note, the Workmen's Compensation Act does not define the compensation received by injured employees as insurance, and several cases have observed, in broad context, that the Act does not render employers insurers of the life and health of their employees. See, e.g., *Monahan v. Seeds & Durham*, 336 Pa. 67, 6 A.2d 889 (1939). Rather, it has been recognized from the outset that the Act is remedial social legislation, which substitutes a relatively quick and inexpensive scheme to provide certain compensation for lost earnings, in place of the common law process under which any damages would be recoverable only after a suit against the appropriate parties, subject to available defenses and, of course, any expenses and delays inherent in the system. Under the scheme, employees are able to obtain compensation without regard to fault—either their own, that of a third party, or even the lack of fault on the part of the employer—while employers are subject to payment of benefits at a set rate, receive immunity from being otherwise subjected to liability for damages, and have a right of subrogation to the extent of compensation paid in the event a third party is held responsible for the injury. Although an employer may secure its obligation to pay compensation by contracting with an insurer, and an injured employee may receive payments directly from the insurance carrier, in determining the nature of the benefits it cannot be ignored that the employer is obligated to provide the compensation without regard to the obtaining of insurance, and if insurance is obtained it is the employer, not the employee, that is the insured."

Id. at ——, 616 A.2d at 617.

The Pennsylvania Supreme Court further explained:

> "The payments an injured employee receives are not themselves insurance benefits, they are an obligation imposed by statute on the employers when an employer obtains insurance to secure the risk that it will have to make such payments, it guarantees a source for the payment of such benefits, but this does not change the nature of the payments due the employee."

Id. supra, at ——, 616 A.2d at 619.

Conceptually, the Pennsylvania Workmen's Compensation Act, as originally enacted, arose out of the contract of hire between the employer and employee. In *Swartz v. Conradis*, 298 Pa. 343, 346, 148 A. 529, 530, (1929), the Pennsylvania Supreme Court explained:

> "When the statutory employer accepts article III [of the Compensation Act] he is relieved of all liability for compensation at common law. Section 303 * * * makes the 'agreement [referred to in section 302] * * * operate as a surrender by the parties thereto of their rights to any form or amount of compensation. * * * or to any method of determination thereof, other than as provided in article III of this act.' "

Id. at 346, 148 A. at 530.

In *Socha v. Metz*, 385 Pa. 632, 123 A.2d 837, 840 (1956), the Pennsylvania Supreme Court further explained the nature of the contract concept.

> "There is a conclusive presumption under the Workers Compensation Act of Pennsylvania that the par-

> ties to every contract of hiring agree to be bound by the Act unless at the time of making, renewal or extension of such contract one or the other of the parties, by express statement in writing rejects the provisions of the Act and the burden of proving that the Act is not applicable is upon the party so asserting."

Socha v. Metz, 123 A.2d at 840.

The contract concept was legislatively eliminated however in Act 263 of 1974, effective February 3, 1975 amended Section 302(a), 77 P.S. § 461 by deleting the rejection option. This amendment made the Workers Compensation Act and Occupational Disease Act, 77 P.S. § 1201 et seq., mandatory without any opt out provision. *Bible v. Com. Dept. of Labor and Industry*, 548 Pa. 247, 696 A.2d 1149, 1153 (1997); *Barber v. Pittsburgh Corning Co.*, 531 Pa. 29, 555 A.2d 766, 769 (1989). In *Bible*, the Pennsylvania Supreme Court stated:

> In 1974, Section 301(a) was amended to provide that, 'Every employer shall be liable for compensation for personal injury to, or the death of each employee, by an injury in the course of his employment. . . .' The references to agreements between employer and employee, either express or implied, and presumptions with regard to acceptance of the Act, were eliminated. The workers' compensation system as it is now structured is purely an exercise of the "police power" of the Commonwealth regulating the employer-employee relationship. As a result, there is no longer any basis for construing the provisions of the Workers' Compensation Act in contractual terms."

Id. at ——, 696 A.2d at 1153.

The petitioners, American Manufacturers Mutual Insurance Company, et al. completely ignore the effect of the 1974 amendments. Moreover, Petitioner's cite a pre-1974 amendment case, *Silas v. Smith*, 361 F. Supp. 1187 (E.D. Pa. 1993), for the proposition that:

> "[W]hat is here involved is a contractual although sanctioned by statute claim to benefits which the other party to the contract disputes." (See Petitioner's, American Mutual Insurance Co., Brief p. 20).

In *Baksalary v. Smith*, 579 F. Supp. at 231 n.19 (E.D. Pa. 1984), the three Judge panel for the Federal District Court for the Eastern District of Pennsylvania stated:

> "Since the decision in *Silas*, Pennsylvania has amended the Workmen's Compensation Act to make it mandatory. . . . We believe that the change in the coverage of the Act from optional to mandatory eliminates *Silas'* analogy of Section 413's automatic supersedeas to the operation of any ordinary commercial contract. The mandatory quality of the Act now makes every aspect of the compensation schemes operation appear more 'public' and less 'private'."

Id. at 231 n.19.

Similarly, the brief of the Amici Curiae American Insurance Association, et al. misconstrues the nature of the statutory relationship between employer/employee as being a private contractual relationship. Their brief states:

> "The statute merely authorizes insurers to invoke a 'self-help' remedy inherent in any private contractual relationship—a refusal to provide contractual benefits pending resolution of a dispute about the scope of the contractual obligation." (p.4) . . . The relationship between insurer, insured employer, employee and medical care provider is thus a voluntary contractual one, albeit one extensively regulated by the state." (p.6)

As the Historical Notes to 77 P.S. § 431 and the *Hankee*, *Bible*, *Winterberg* and *Baksalary* cases demonstrate, contract analysis has had no place in interpretation of the Pennsylvania Workmen's Compensation Act for nearly twenty-five years since the 1974 amendments to the Act.

The exclusive nature of this public benefit system, which is an incident of employment in Pennsylvania, has

been reaffirmed in a myriad of decisions and circumstances by the Pennsylvania appellate courts and federal courts interpreting the Act. *See* e.g. *Kline v. Arden H. Verner, Co.*, 503 Pa. 251, 256, 469 A.2d 158, 160 (1983), (a tort action for any work-related injury was barred.); *Poyser v. Newman & Co., Inc.*, 514 Pa. 32, 522 A.2d 548, 550 (1987), (Act is "a version of the historical *quid pro quo* the employers received in return for being subjected to a statutory, no-fault system of compensation for worker injuries. An employer is immune for intentional misconduct and deliberate disregard for employees' safety."); *Barber v. Pittsburgh Corning Co.*, 521 Pa. 29, 555 A.2d 772 (1989) (Employer immune under Occupational Disease Act from tort action for deliberate or reckless conduct injuring employee.), *Kuney v. PMA*, 525 Pa. 171, 578 A.2d 1285 (1990) (a workers compensation insurer is conferred immunity coextensive as its insured); *LeFlar v. Gulf Creek Indus. Park No. 2*, 511 Pa. 574, 515 A.2d 875, 879 (1986) (Act deprives the common pleas courts of jurisdiction of common law tort actions for negligence against employers.); *Rosipal v. Montgomery Ward*, 360 Pa. Super. 570, 521 A.2d 49 (1987), allocator granted, 516 Pa. 635, 533 A.2d 93 (1987), app. dis., 517 Pa. 460, 538 A.2d 495 (1989) (An employer cannot be sued in tort for alleged bad faith filing of a termination petition where it was alleged that the employer filed a fraudulent and perjured affidavit.). *See also Winterberg v. Transp. Ins. Co.*, 72 F.3d 318, 325 n.4 (3rd Cir. 1998) (An insurer cannot be sued under the Pennsylvania "bad faith" insurance statute, 42 Pa. C.S.A. § 8371 and the Unfair Trade Practices and Consumer Protection Law, 73 Pa. S. § 201-1 et seq.)

The Pennsylvania Supreme Court has recognized that the Pennsylvania Act was unique and differed from other states workers compensation Acts. In *Poyser v. Newman & Co., Inc.*, supra, then Justice, later Chief Justice Robert N.C. Nix Jr. writing for the Pennsylvania Supreme Court stated:

> "It is true that the appellate courts of some other states have held that wanton and willful misconduct by an employer is tantamount to an intentional tort, and as such, prevents the operation of a statutory exclusive-remedy provision. See, *e.g., Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978). It must be noted, however, that those cases rested on provisions in the state workmen's compensation statutes which expressly preserved their right of an employee to sue in tort where his injury was caused by the employer's intentional wrongdoing. There is no such provision in The Pennsylvania Workmen's Compensation Act."

Id. at 37-38, 522 A.2d at 557.

Prior to Act 44 of 1993, all decisions regarding contests regarding reasonableness or necessity of all treatment provided by a health care provider to injured workers was subject to the exclusive jurisdiction of workers compensation "referees", now known as workers compensation judges. *See* 77 P.S. § 531(2)(ii) (1978) and 77 P.S. § 701-717 (1978). Workers compensation judges were under the supervisory jurisdiction of the Secretary of the Department of Labor and Industry. 77 P.S. § 701.

Prior to Act 44, the employer had the right to petition the Department for review of the necessity or frequency of treatment or reasonableness of fees for services provided by a physician or other duly licensed practitioner of the healing arts. 77 P.S. § 531 (1978). Prior to Act 44 of 1993, 77 P.S. § 531(2)(ii) specifically provided that the filing of a Petition to Review the reasonableness or necessity of medical treatment "shall in no event act as a *supersedeas*, and during the pendency of any such petition the employer shall pay all bills if the physician or other practitioner of the healing arts files a report or reports as required . . ." (emphasis added)

After the enactment of Act 44, all contests initiated by the insurance carrier, or employer, as to the reasonableness or necessity of all medical treatment provided to a

worker was required to be submitted to a utilization review organization authorized to make utilization review by the Department of Labor and Industry. 77 P.S. § 531(6)(i) (1993). 77 P.S. § 531(6)(f) provides that the department shall authorize utilization review organizations to perform utilization review under the Act. "Organizations not authorized by the department may not engage in such utilization review." Section 77 P.S. § 531(6)(i).

Once an employer, or insurer, disputes the reasonableness or necessity of treatment provided to an injured worker *and the Bureau approves the filing* (*see Tulsa Professional Collection Services v. Pope*, 488 U.S. at 486-87), the employer or insurer has no obligation to pay for the medical treatment. 77 P.S. § 531(5) (1993). The employer's obligation to pay is "tolled". 34 Pa. Code §§ 127.208(e)(f), 127.403. Under prior statutes, the suspension of the employer's obligation was termed a "supersedeas". *See* 77 P.S. § 531(2)(ii) (1978). Apparently, the drafters of the Act 44 of 1993 automatic suspension, or supersedeas provisions believed that the effect of *Baksalary v. Smith supra*, prohibiting prehearing deprivation of benefits, could be circumvented if the obligation to pay ongoing benefits was interrupted by what is termed a "tolling" rather than a "supersedeas". This suggests an attempt to elevate form over the substance in this situation. In practical terms, the "tolling" under the utilization review procedures of Act 44 of 1993 constitutes what was formerly known as "supersedeas" or suspension if the Department of Labor and Industry, Bureau of Workers Compensation approves the filing requesting utilization review by the insurer/employer.

Under Act 44 as originally drafted, all an insurance carrier need to do in order to suspend, toll or supersede its obligation to pay for ongoing medical benefits "as and when needed" by an injured worker, is to file a request *for utilization review for all past and future medical treatment*, subject to the approval of the Bureau. See 77 P.S. § 531(5) and (6). In present practice, insurers routinely

request review for all present and future treatment and medical expenses.

These disabled workers have a legitimate claim of entitlement to ongoing medical services for that work-related disability because they are already adjudicated as having work related injuries. *Baksalary v. Smith*, 579 F. Supp. at 225 (1984) (finding that a person already receiving workers' compensation benefits has a property interest in the continued receipt of such benefits.) Act 44 utilization review defeats the right to uninterrupted benefits without giving the injured worker any predeprivation notice or opportunity to explain how the questioned treatment impacts on his or her life. *Sullivan v. Barnett*, 139 F.3d at 175-177. The Third Circuit has explained:

> "[A] particular treatment might be the only medical treatment that alleviates an individual's pain or mitigates the severity of his or her symptoms. As the utilization review process concerns itself only with the specific medical practice that is being challenged, *see* 34 Pa. Code § 127.490, the reviewing physician may have little or no perspective as to how a particular treatment is benefitting the patent in the context of the overall medical care that the employee has undergone during the course of his/her disability. The opportunity for the employee to present his/her side of the story—to introduce his/her own personal account as to how the particular treatment has ameliorated his/her condition—may be highly relevant to the URO's determination and may not be adequately reflected or documented in the medical reports."

Sullivan v. Barnett, at 177.

Act 44 of 1993 does not provide for an immediate hearing for acute care service denials, particularly where delivery of service is prevented by a denial. In *"Cost as a Barrier to Medical Care in Relation to Unemployment Rates"*, the authors, physicians and researchers from the Center for Disease Control and Prevention in Atlanta recently wrote:

> "To the Editor: There is a strong evidence that people who receive medical treatment in a timely manner have improved health outcomes. Thus, delays in seeking medical care because of concern about cost can have serious effects. This consideration was prominent in the debate on health care reform in the early 1990's but received much less publicity once the national effort to reform health care failed."

The New England Journal of Medicine, Nelson et al., *"Cost as a Barrier to Medical Care in Relation to Unemployment Rates"*, Vol. 339, No. 22, pg. 1644-1645 (November 26, 1998) (Appendix Exhibit 4A-6A).

In this sense, denial of access to timely medical care constitutes a "uniquely final deprivation which a retroactive mandatory award can never remedy." *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 862 (1978) (referring to the time plaintiff's spend without access to utilities, enduring cold, darkness and lack of water, which cannot be remedied by or after the fact damage award.)

Moreover, most, if not all private medical insurance contracts, contain exclusions for payment of medical expenses for conditions which are causally related to an injury suffered in the course and scope of employment. For instance, the agreement between Blue Cross/Blue Shield of Northeastern Pennsylvania and employer's provides an exclusion for illness or injury that is subject to workers compensation coverage. (*See, e.g.*, Appendix Exhibit 7A-8A).

Thus, the practical effect of the filing of a request for utilization review, which must be approved by the State, is to restrict an admittedly disabled worker's access to care during the pendency of the review process. Even if an employee has alternative coverage, the work-related injury exclusions will result in denial of authorization for care and resulting restriction of access to reasonable health

care. This will have grave consequences for the worker because it may mean that the worker will go without medical necessary service, including making prescriptions available for relief of pain. Given the many months or even years that it takes for appeal of utilization review determinations, deprivations without notice or opportunity to be heard will have significant impact on the quality of life of disabled workers and may even be life-threatening. Subsequent due process comes too late in many cases. *Memphis Light, Gas & Water Division v. Craft*, supra.

The Third Circuit properly recognized that:

> "We are also aware that the government has an interest in not wrongfully depriving medical benefits to disabled individuals and ensuring that employees who reasonably and legitimately need medical care under the Act will continue to receive it."

139 F.3d at 176.

Finally, in the Reply Brief for Petitioners in support of their Petition for Certiorari, the insurers state that:

> "[T]he real targets of utilization review are not the injured workers, but unscrupulous medical care providers who provide unnecessary and unreasonable service to workers."

(*See* American Manufacturers Mutual Insurance Company, et al. Reply Brief for Petition for Writ of Certiorari 9). If this is the case, why doesn't the Pennsylvania legislature address the real target of utilization review, and stop denying procedural due process to legitimately entitled workers who suffer the misfortune of disabling injury through no fault of their own. Perhaps, the insurance companies can recoup their monies from those so-called "unscrupulous physicians" by employing the Pennsylvania Medical Practice Act of 1985 and the American Medical Association Code of Ethics, the hollow remedy that the Petition insurers offer injured workers to protect their right to uninterrupted medical care as and when needed.

CONCLUSION

In the unique context of the Pennsylvania Worker's Compensation system, Amici submit that the decision of the Third Circuit Court of Appeals below should be affirmed, as an appropriate exercise of the authority of the federal courts to guarantee rights to procedural due process of law guaranteed by the United States Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803)). "[T]he very essence of judicial duty," is to determine whether a legislative act is repugnant to the Constitution and is therefore "void." *Marbury v. Madison*, 5 U.S. at 177-178. In *The Federalist*, No. 78, by Alexander Hamilton, he reasoned

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.
>
> * * * *
>
> A constitution is, in fact, and must be regarded by the judges as, a fundamental law. . . . . [The judges] ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

The Federalist, No. 78, Hamilton (1787-1788).

Amici respectfully submit that this is precisely what the Third Circuit did below in determining that suspending payment of medical compensation without affording disabled workers any predeprivation notice or opportunity to be heard violated the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX

SESSION OF 1988

No. 1988-56A

AN ACT

HB 2414

Appropriating and transferring amounts from the State Workmen's Insurance Fund to the Treasury Department and the General Fund.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The following sums, or as much thereof as may be necessary, are hereby appropriated from the State Workmen's Insurance Fund for the fiscal year beginning July 1, 1988:

(1) The sum of $25,000,000 is appropriated to the Treasury Deprtment for transfer to the Sunny Day Fund.

(2) The sum of $25,000,000 is appropriated to the Treasury Department for transfer to the Tax Stabilization Reserve Fund.

Section 2. The sum of $60,000,000 is hereby transferred from the State Workmen's Insurance Fund to the General Fund.

Section 3. This act shall take effect immediately.

APPROVED—The 14th day of October, A. D. 1988.

ROBERT P. CASEY

The Scranton Times—March 10, 1988

STATE FUND-TRANSFER PLAN IS BOTH CRITICIZED, PRAISED

Associated Press

HARRISBURG—A Casey administration plan to dip into a state insurance fund to provide aid for mass transit and other programs has been criticized by some lawmakers, but state officials say the move is "wise and defensible."

The proposed transfer, which would shift about $220 million from the State Workman's Insurance Fund, was proposed by Casey last month.

During legislative budget hearings Wednesday, administration officials were badgered about the plan, which must be approved by the Legislature.

Some lawmakers have said the transfer, including $25 million for mass transit, is unconstitutional.

Michael Hershock, the state budget secretary, told members of the Senate Appropriations Committee the transfer had been reviewed by the governor's legal staff and was feasible.

"We stand behind our request. We think it is a wise and defensible one," he said.

Transportation Secretary Howard Yerusalim told members of the House Appropriations Committee that although lawmakers may not go along with the SWIF transfer, that administration officials would "not turn our back on mass transit."

Yerusalim said Casey was committed to a 4 percent boost for mass transit. In a later interview, Yerusalim said there was no contingency plan to replace the $25 million if the SWIF transfer is not approved. However, he said he was confident mass transit would get the SWIF funds.

SWIF is a worker compensation insurance program for the state and other employees who can't get insurance on the open market. One administration official has described SWIF as an "embarrassment of riches," which has expanded rapidly through prudent investments.

Hershock told the committee if SWIF funds are not included in the budget, the funds needed for those programs "will come from somewhere else."

In other issues discussed Wednesday during budget hearings, testimony submitted to the House committee by Revenue Secretary Barton Fields indicated sales of lottery tickets are expected to increase about 6 percent over 1986-87 levels by the close of the fiscal year. Sales were initially projected to show a 3 percent increase.

However, Fields warned that the lottery fund will go into deficit by 1989-90 unless continued cost-cutting steps and other measures are taken.

"Lottery-funded program costs are still increasing at a rate significantly faster than the rate of sales growth," he said.

On college funding, Hershock defended the administration's proposed 4 percent increase for higher education. Senate Republicans have suggested a 10 percent increase.

Hershock said state-owned and state-related universities across the state sought increases of between 16 percent and 31 percent for fiscal 1988-89.

"There's no way short of a tax increase we could meet those kinds of requests," he said.

The New England Journal of Medicine—
November 26, 1988

COST AS A BARRIER TO MEDICAL CARE IN RELATION TO UNEMPLOYMENT RATES

To the Editor: There is strong evidence that people who receive medical treatment in a timely manner have improved health outcomes.[1-2] Thus, delays in seeking medical care because of concern about cost can have serious effects. This consideration was prominent in the debate on health care reform in the early 1990s but received much less publicity once the national effort to reform health care failed.

We examined trends in the perception that cost is a barrier to medical care. Data from 1991 through 1996

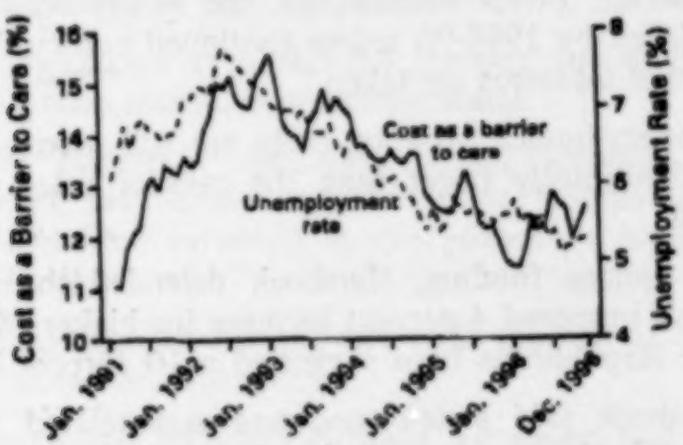

Figure 1. Prevalence of the Perception That Cost Was a Barrier to Medical Care, According to the Unemployment Rate, from January 1991 through December 1996.

[1] The Hypertension Detection and Follow-up Program Cooperative Group. Persistence of reduction in blood pressure and mortality of participants in the Hypertension Detection and Follow-up Program. JAMA 1988;259:2113-22.

[2] The Lipid Research Clinics Coronary Primary Prevention Trial results. I. Reduction in incidence of coronary heart disease. JAMA 1984;251:351-64.

were obtained from the 45 states (all but Arkansas, Kansas, Nevada, Rhode Island, and Wyoming) that participated in the Behavioral Risk Factor Surveillance System in each of these years.[3] Monthly telephone surveys of randomly selected adults were conducted in each state; the median annual rates of response ranged from 77.8 to 84.2 percent. Data were weighted according to each state's population and pooled, resulting in monthly sample sizes ranging from 5756 to 7947 respondents. Our analysis of the perception that cost was a barrier to medical care was based on the response to the following question: "Was there a time during the last 12 months when you needed to see a doctor, but could not because of the cost?" We used a time-series approach to analyze these data for all months and then compared our findings with monthly unemployment rates during the same period.

The prevalence of the perception that cost was a barrier to medical care increased from 11 percent to 15 percent from January 1991 to January 1993 but then declined nearly to the 1991 value by late 1996 (Fig. 1). Comparisons of monthly unemployment rates and the prevalence of the perception that cost was a barrier to care showed a slight difference between the two during the first nine months of 1991, with the patterns of the two variables then becoming similar for the rest of the study.

Although other factors (e.g., increased enrollment in managed care and extensive media coverage of health care reform efforts) may have had a role,[3-4] changes in unemployment seem to correlate strongly with trends in people's perception that cost is a barrier to obtaining med-

[3] State- and sex-specific prevalence of selected characteristics—behavioral risk factor surveillance system, 1994 and 1995. MMWR CDC Surveill Summ 1997;46(3):1-31.

[4] Centers for Disease Control and Prevention, Health, United States, 1996-97: injury chartbook, Hyattsville, Md.; National Center for Health Statistics, 1997.

ical care. This makes sense, given the reliance in the United States on employer-based health insurance. Concern about health care costs and pressure for health care reform may increase in conjunction with increases in unemployment, as occurred from January 1991 to January 1993.

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Services which are not prescribed by or performed by or billed by a Professional Provider.

Services which are not medically necessary as determined by Blue Shield.

Services, supplies or charges that are experimental or investigational in nature.

Services performed in a facility by a Professional Provider who in any case is compensated by the facility for similar services performed for patients.

Services performed by a Professional Provider enrolled in an education or training program when such services are related to the education or training program.

Services which are paid, or payable, in whole or in part, by a Blue Cross Plan.

Services which are incurred prior to your effective date or during an inpatient admission that commenced prior to your effective date.

Services which are incurred after the date of termination of your coverage unless otherwise indicated.

Services for any illness or bodily injury which occurs in the course of employment if benefits or compensation are available, in whole or in part, under the provisions of any legislation of any governmental unit. This

exclusion applies whether or not you claim the benefits or compensation.

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Charges submitted by a Certified Registered Nurse and another Professional Provider for the same services performed on the same date for the same patient.

Service which you have no legal obligation to pay in the absence of this or similar coverage.

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Payment made under Medicare when Medicare is primary, or would have been made if you had enrolled for Medicare and claimed Medicare benefits. However, this exclusion shall not apply when the Group is obligated by law to offer the Subscriber all the benefits of this contract and the Subscriber so elects this coverage as primary.

The Scranton Times—Thursday, February 25, 1988

REALLOCATION PROPOSAL GETS SWIF BOARD NOD

The State Workmen's Insurance Fund board of directors has endorsed Gov. Robert P. Casey's proposal to reallocate $221 million from the fund's surplus reserve accounts for economic development purposes.

"In recent years, the state's Workmen's Insurance Fund has seen its assets swell to nearly $1 billion," said Harris Wofford, secretary of Labor and Industry and chairman of the SWIF board.

"The board's endorsement of these initiatives not only will further economic development throughout the commonwealth, it also sends a clear signal that investigating in Pennsylvania's economic future makes good business sense," Wofford said.

The state Legislature must now act on Casey's proposal—which is part of his plan to pay off Pennsylvania's once massive Unemployment Compensation debt to the federal government.

If the debt is paid off by November, it is estimated that Pennsylvania employers will save $475 million in payroll taxes for 1989.

On Feb. 5, Casey announced a way to repay the state's remaining $195 million debt to the federal government with $146 million from the Unemployment Compensation Trust Fund, and another $49 million surplus from the Unemployment Interest Fund.

As part of the governor's plan, a $146 million "reserve fund" will be created using SWIF excess funds. That fund would be used only if the unemployment fund falls below a predetermined level.

Casey urged the Legislature to approve the use of Workmen's Insurance Fund monies for the reserve ac-

count, and instructed the Unemployment Compensation Advisory Council to design a "trigger mechanism" that would assure the UC Fund's continued solvency.

In a separate action, the board authorized the investment of up to $15 million of assets in an investment fund that targets loans to Pennsylvania businesses.

The board also directed its finance committee to recommend a way to invest in the Pennsylvania Private Placement Separate Account.

The fund, designed in 1983 by the MILRITE Council, will target its investments to Pennsylvania-based companies that don't have access to public bond markets to finance expansion and modernization projects.

Other investors in the fund include corporate, union and public pension funds.

Investment in the account by SWIF would require final approval by the board.

The boards' actions follows a review of the fund's financial condition by Huggins Financial Services Inc. The review determined that the fund has accumulated monies from its investments substantially in excess of the amount required to protect the interests of policyholders, claimants and the Fund.

SWIF, a state-run insurance company with its headquarters in Scranton, provides workers' compensation insurance protection to Pennsylvania state workers and other employers in the commonwealth.

As of Jan. 31, SWIF had assets of nearly $1 billion.

The Scranton Times—April 20, 1992

CLOSED BANKS SET TO REOPEN

HARRISBURG (AP)—Two private banks closed by the state for poor management were set to reopen today as newly-chartered and federally-insured state banks.

Reading-based Knoblauch State Bank and Marian State Bank in Philadelphia were scheduled to open at 9 a.m., Sarah W. Hargrove, state banking secretary, said in a statement.

The state Department of Banking closed the banks known as Tobias Knoblauch Private Bank and Marian Bank on Friday, citing management that posed a risk to depositors' money.

Tobias Knoblauch, which has branches in Reading, Villanova and Philadelphia, had inadequate capital, while Marian was insolvent. Hargrove said Friday.

The deprtment and a team of banking officials worked through the weekend to have bank deposits up to $100,000 insured by the Federal Deposit Insurance Corporation.

The reopened banks are owned by the State Workmen's Insurance Fund, which can provide capital to keep them in operation.

Customers who had deposits that exceeded $100,000 at the closed banks will be contacted and told how to file a claim for amounts that may be uninsured.

Reading Eagle—April 18, 1993

DEAD BANK'S GHOST
HAUNTS COURTS

• The seizure of the Tobias Knoblauch Private Bank spawns a protracted legal dispute that devours time and money. There appears to be no end in sight.

By Don Spatz
Eagle Times

A year ago—on April 17, 1992—state Banking Secretary Sarah W. Hargrove seized the ailing Tobias Knoblauch Private Bank in Reading, touching off a complex court battle that will last at least through the summer and perhaps till next year.

The bickering continues both inside and outside of court, as the sides seem to want to take their cases both to the judge and to the public.

"We are amazed, disappointed and incredulous . . . that the actions of the general partners (of Knoblauch) are distorting the facts as well as drawing attention away from what we see as the bottom line: They mismanaged the bank, for which they are personally responsible," said Banking Department spokeswoman Stephanie G. Maurer.

"It's difficult to believe a Cabinet-level officer of the commonwealth could be in such incredible violation of the law," said attorney Alan S. Fellheimer, who represents the general partners. "But this person (Hargrove) absolutely refuses to follow the law."

After 12 months of legal wrangling—through more than a dozen separate cases, nearly 4,000 pages of testimony, more than 100 exhibits, hundreds of separate written arguments and objections, dozens of hearings, and millions of dollars in legal fees and expenses—several points are evident:

• No out-of-court settlement seems likely, despite six months of pressure by Berks County President Judge Forrest G. Schaeffer Jr. Instead, the sides seem to have dug deeper into their trenches.

Schaeffer is presiding over most of the suits, those filed in county court. Others have been filed in Commonwealth Court and in U.S. District Court. Most are complaints lodged by Knoblauch's partners against Hargrove.

• Failing a settlement, the case could take years. Whatever Schaeffer's ultimate decision, it likely will be appealed because the political and financial stakes are so high.

• The legal battle's expenses are rapidly approaching the amounts suggested to settle the case.

When Hargrove seized the bank April 17—immediately after winning Schaeffer's approval during a secret hearing—she claimed it was near insolvency and was being run in an unsafe and unsound manner by its partners: Hugh Kenworthy III, W. Thomas Tither, William R. Dimeling, and John C. Tuten.

She transferred its best assets and insured deposits to the new Knoblauch State Bank, operating ever since. Its uninsured deposits—portions of accounts above $100,000—and worst assets were kept in the receivership, and about 200 uninsured depositors were told they may not get all their money back.

But the partners cried foul. They claimed the ailing bank was getting back on its feet when Hargrove seized it and alleged she misled Schaeffer and broke numerous state laws regarding bank seizures and disposal of bank assets. The court battle began.

Schaefer boiled down the intertwining cases to three bank questions: Did Hargrove properly seize the bank? Did the later properly dispense of its assets? Are there any damages to be awarded to anyone?

So far, testimony has been heard on only the first.

From August through January, Schaeffer tried to get the parties to settle. They didn't. In January, he vacated his order approving the seizure, but did not void the seizure itself.

The attorneys prepared to dig into the case again. In March, Schaeffer issued a three-page agenda scheduling new arguments and deadlines through August to deal with the remaining issues of just the first question. However, that agenda already is weeks behind schedule.

The case is becoming one of the more expansive disputes in county court. The state Banking Department has said it spent nearly $500,000 through December, just for its outside law firm handling the local cases. (The cases are so complex, the law firm brings three attorneys to each hearing: one of them does nothing but keep track of the numerous documents.)

Then there is the time expended on the case by the department's staff attorneys, by Hargrove and several of her officials, who have spent many weeks in court and in depositions and by attorneys for several sets of general partners, two sets of limited partners, a class of uninsured depositors, the state bank, and the State Workmen's Insurance Fund, which owns the state bank. There are private stenographers and other hefty paper-shuffling expenses.

Maurer, the state Banking Department spokeswoman, said the case has created a lot more work, requiring employees to put in many extra hours, but the department is accomplishing its other regulatory tasks.

"It's not something we mind," she said. "We feel we're fighting for something that's right and that ordinary people would want to see addressed."

She also said the department is not frustrated by the duration of the case.

"Fighting for something right is never frustrating," she said.

But Fellheimer said he's frustrated.

"The case is taking a long time," he said. "We lost six months while they tried to settle it. I can't blame the judge for that. But I think that the unfortunate thing about this case is that it never had to happen."

Back to the bickering.

Fellheimer repeats the partners' long-standing contention: Hargrove broke the law.

"She (Hargrove) has acted to the detriment of my clients in total disregard of the statutes," Fellheimer said. "The Legislature goes to a lot of trouble to write laws . . . and the secretary (Hargrove) says, 'I'll ignore them and do it my way.'

"But that's what the Legislature is for, to protect us against runaway officials. I think the courts are realizing that, and will ultimately require them (state officials) to make good."

Maurer repeats the state's long-standing contention: The partners mismanaged the bank and gave themselves preferential treatment with depositors' money.

"They lent money to themselves beyond their legal limits . . . and made loans to themselves at better rates than other (customers) in Reading had access to," she said.

She said those above-the-limit loans ranged from $535,000 for Tuten to $1.4 million for Tither. She also accused the partners of not repaying those loans and constantly bouncing checks.

Meanwhile, the case widens.

In the last month, the partners have sued Hargrove to return $4 million they claim she illegally took from the

Pennsylvania Deposit Insurance Corp., which insured private bank deposits. And Hargrove has sued the partners for what could be $6 million to pay off those uninsured depositors.

In her suit, Hargrove also named as a defendant Richard A. Ehst, the former Knoblauch president who left in 1989 and returned as a consultant in February 1991 to help it straighten out its finances.

Strangely conspicuous by his absence from Hargrove's suit, however, was James T. Klein, the bank president from 1989 to February 1991, when he left to join Security First Bancorp in Media. Most of Hargrove's suit deals with the time period of Klein's tenure, but he is not even mentioned.

"We believe Jim Klein inherited a lot of problems," Maurer explained. "Ehst was there at a critical time and had an active hand in management; that's why he's named."

* * * *

Reading Eagle—April 18, 1993

WILL BANK SUCCESSOR SUCCEED?

■ Knoblauch State Bank is turning around, but will it sell?

By Don Spatz
Eagle Times

Born in a firestorm, the Knoblauch State Bank will quietly celebrate its first anniversary Tuesday with hopes it may actually make a profit by the end of the year.

But President John J. Brine, brought in to get the bank ready for sale, said the widening controversy surrounding its predecessor—the Tobias Knoblauch Private Bank—makes it unlikely the state bank can be sold by an April 1994 deadline.

For the moment, it still is trying to keep its customers comfortable and seems to be successful, Brine said.

"WE'RE doing the blocking and tackling, day by day, building up the deposit base, building up the loan customers. We're operating at a break-even basis. We expect to be earning money by the end of the year."

John J. Brine
president, Knoblauch State Bank

"This is a slow-recovery kind of industry," he said. "We're doing the blocking and tackling, day by day, building up the deposit base, building up the loan customers. We're operating at a break-even basis. We expect to be earning money by the end of the year."

The state banking department created Knoblauch State Bank to take over after Banking Secretary Sarah W. Hargrove seized the private bank on April 17, 1992, on the grounds it was on the brink of collapse. The private bank

partners cried foul and sued Hargrove, and the case remains in court.

The State Workman's Insurance Fund bought the new state bank as an investment for $17 million, intending to sell it in two years.

SWIF has a guaranteed profit; if it can't make a profit on the sale, it has been promised taxpayers' money from the general fund. But SWIF can't sell the bank until the suit is resolved.

Knoblauch opened amid the controversy's first shots, and Brine said there "were a couple of months where we ended up operating in a crisis situation . . ."

"We probably had more disturbances than most successor managements in other places," he said. "It took awhile to deal with it, and it took awhile for customers to deal with it in their own way."

One way was withdrawals; the bank lost more than $28 million in deposits in its first months. Although its operations remained profitable, it took an $625,000 loss for 1992 because of problem loans and legal expenses.

Brine said deposits and the rest of its core business have since stabilized, but he noted the court case length and publicity "has impeded our ability to make the most that can be made out of the (state) bank. With significant suits still outstanding, it's probably impossible" for SWIF to make its deadline, he said.

SWIF spokesman Frank Lynch would not comment on that possibility, but said that given the same situation, SWIF would buy another bank.

"You have to look at the investment two ways," he said. "One is public responsibility; there were 15,000 families with their deposits at risk. Luckily, SWIF was in a position to do something about that.

"Strictly on the investment side, SWIF is well protected with the guarantee. We have had no second thoughts about that."